Supreme Court, U.S.
FILED
FEB 15 1994

(2)

No. 93-948

In the Supreme Court of the United States

OCTOBER TERM, 1993

HENRY CHIMEZIE OKPALA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK C. WALTERS
NORAH ASCOLI SCHWARZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

(3)

QUESTION PRESENTED

Whether time an alien spends in this country as a nonimmigrant student visitor can count towards the "seven consecutive years" of "lawful unrelinquished domicile" required for relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Anwo, In re, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review denied, 607 F.2d 435 (D.C. Cir. 1979)	6
Anwo v. *INS*, 607 F.2d 435 (D.C. Cir. 1979)	6, 8
Brown v. *INS*, 856 F.2d 728 (5th Cir. 1988)	8
Castillo-Felix v. *INS*, 601 F.2d 459 (9th Cir. 1979)	6-7
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	6
Chiravacharadhikul v. *INS*, 645 F.2d 248 (4th Cir.), cert. denied, 454 U.S. 893 (1981)	3, 7
Elkins v. *Moreno*, 435 U.S. 647 (1978)	8
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3
Graham v. *INS*, 998 F.2d 194 (3d Cir. 1933)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	6
Kim, In re, 17 I. & N. Dec. 144 (B.I.A. 1979)	6
Madrid-Tavarez v. *INS*, 999 F.2d 111 (5th Cir. 1993)	8
McBride v. *INS*, 112 S. Ct. 1558 (1992)	8
Melian v. *INS*, 987 F.2d 1521 (11th Cir. 1933)	8
Michelson v. *INS*, 897 F.2d 465 (10th Cir. 1990)	7
Newton, In re, 17 I. & N. Dec. 133 (B.I.A. 1979)	6
Power Reactor Development Co. v. *International Union of Electrical Workers*, 367 U.S. 396 (1961)	6
S--, In re, 5 I. & N. Dec. 116 (B.I.A. 1953)	5-6, 7
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976)	3
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981)	3

Cases—Continued: Page

Tim Lok v. *INS:*
548 F.2d 37 (2d Cir. 1977) 7
681 F.2d 107 (2d Cir. 1982) 7, 8

Statutes:

Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 878 5
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(15) 8
8 U.S.C. 1101(a)(15)(F)(i) 8
8 U.S.C. 1182(c) (1988 & Supp. IV 1992) 2, 3, 4, 5, 7
8 U.S.C. 1251(a)(2)(A)(i)(I) (Supp. IV 1992) 2
8 U.S.C. 1251(a)(2)(A)(i)(II) (Supp. IV 1992) 2
18 U.S.C. 371 2
18 U.S.C. 1344 (1988) 2
42 U.S.C. 408(g)(2) 2

Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 5
S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 5

BEST AVA

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-948

HENRY CHIMEZIE OKPALA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is unreported. The opinion of the Board of Immigration Appeals (BIA) (Pet. App. 14-16) is unreported. The opinion of the immigration judge (Pet. App. 2-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. The petition for a writ of certiorari was filed on December 13, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ILABLE COPY

STATEMENT

1. Petitioner is a native and citizen of Nigeria who was admitted to this country in 1982 as a non-immigrant student. In 1988, petitioner obtained conditional lawful permanent resident status on the basis of his marriage the previous year to a United States citizen; that condition was satisfied two years later in 1990, and petitioner became a lawful permanent resident at that time. See Pet. App. 4-5, 18; Pet. 3-4.

In 1989, petitioner was convicted in the United States District Court for the District of Maryland on two counts of making a false representation of a Social Security number, in violation of 42 U.S.C. 408(g)(2) (1988). In 1990, he was convicted in the United States District Court for the Western District of North Carolina of bank fraud, in violation of 18 U.S.C. 1344 (1988), and conspiracy to defraud the United States, in violation of 18 U.S.C. 371. See Pet. App. 4, 18-19.

2. On May 13, 1991, the Immigration and Naturalization Service issued an order to show cause charging that petitioner is deportable under 8 U.S.C. 1251(a)(2)(A)(i)(I) and (II) (Supp. IV 1992), as an alien convicted of multiple crimes involving moral turpitude. Pet. App. 5. Petitioner conceded that he was deportable, but sought relief from deportation under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven

consecutive years."[1] Petitioner apparently relied on the period from 1982 to 1988 (when he was in this country as a nonimmigrant student) to establish the seven years of domicile. The immigration judge, however, concluded that petitioner was ineligible for relief under Section 1182(c) because he had failed to establish that he had been "a permanent resident for a period of seven (7) years." Pet. App. 13.

3. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 14-16. The Board "decline[d] to revisit * * * [its] holding that the lawful domicile of a respondent for purposes of [Section 1182(c)] begins only when that respondent is admitted for lawful permanent residence." *Id.* at 15-16. Because petitioner's period of lawful permanent residence (which started only in 1988) was less than seven years, the Board dismissed the appeal. *Id.* at 16.

4. The court of appeals denied a petition for review. Pet. App. 17-23. Relying on its decision in *Chiravacharadhikul* v. *INS*, 645 F.2d 248, cert. denied, 454 U.S. 893 (1981), the court explained that an alien is entitled to relief under Section 1182(c) only if he can establish that he had "seven consecutive years of

---

[1] Although the statute on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See, *e.g.*, *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (B.I.A. 1976); see also *id.* at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

residence in the United States as a lawful permanent resident." Pet. App. 23. Because petitioner's period of permanent residence did not commence until 1988, the court concluded that he was not eligible for relief and denied his petition for review. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct. Although the Second Circuit has rejected the Board's methodology for calculating the seven-year period under Section 1182(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the law of any of the other circuits. Accordingly, review by this Court is not warranted in this case.

1. The language of the statute, considered in light of the context in which the statute was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. The statute provides that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c) (1988 & Supp. IV 1992). In our view, it is logical to assume that the reference to the unrelinquished domicile as "lawful" —following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—is intended to tie the circumstances in which an alien can establish the requisite type of domicile to the alien's immigration status, so that the alien can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence"; any

domicile established when an alien is not "lawfully admitted for permanent residence" cannot be "lawful" for these purposes.[2]

That reading of the statute gains support from the circumstances of its enactment. The provision—enacted as part of the Immigration and Nationality Act of 1952 (INA)—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Act of Feb. 5, 1917, ch. 29, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to aliens "who came in through the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950). To accomplish that purpose, Congress revised the 1917 statute in two ways: (1) by adding the initial clause, which limits the provision to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domiciles that would support relief.

The Board considered that provision shortly after the INA was enacted, in *In re S—*, 5 I. & N. Dec. 116

---

[2] A domicile is an individual's "established, fixed, permanent, or ordinary dwellingplace * * * , as distinguished from his temporary and transient, though actual, place of residence." *Black's Law Dictionary* 435 (5th ed. 1979). Accordingly, under Section 1182(c), an alien cannot lawfully form a domiciliary attachment to the United States until he is lawfully admitted as a permanent resident.

(B.I.A. 1953). In that case, the BIA reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded that:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 188. The Board consistently has adhered to that interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (B.I.A. 1979); *In re Kim*, 17 I. & N. Dec. 144 (BIA 1979).[3] The Board's interpretation is entitled to strong deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). Accordingly, as three courts of appeals have concluded, the Board's interpretation should prevail. See *Castillo-*

---

[3] The BIA has not, however, adhered to that interpretation in cases arising in the Second Circuit, in deference to the contrary interpretation adopted by the Second Circuit in *Tim Lok* v. *INS*, 548 F.2d 37 (1977). See *In re Anwo*, 16 I. & N. Dec. at 298.

Felix v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re S—*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 250 (4th Cir.) (same), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990) (same).

2. Petitioner correctly notes (Pet. 5-6) that the Second Circuit adopted a contrary view in *Tim Lok* v. *INS*, 548 F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the Board's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 1182(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See *id.* at 39-40. In a second opinion dealing with Tim Lok's case, however, the Second Circuit substantially limited the import of its decision in *Tim Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establis[h] *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he could not establish a lawful domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of the Third, Fifth, Eleventh, and District of Columbia Circuits, which have recognized the differing approaches and yet—without deciding whether the Board's interpretation or the Second Circuit's should prevail—have denied petitions for review of Board orders in cases like this one

on the theory that nonimmigrant visitors cannot establish a "lawful" domicile. *Graham* v. *INS*, 998 F.2d 194, 195-196 (3d Cir. 1993) (temporary worker); *Madrid-Tavarez* v. *INS*, 999 F.2d 111, 112 (5th Cir. 1993) ("[A]n alien student, by the terms of his student visa, could not lawfully possess an intent to remain in the United States; but if the student did in fact form such an intent, then he was in violation of his visa and was not here lawfully."); *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988) (student visitor); *Melian* v. *INS*, 987 F.2d 1521, 1524-1525 (11th Cir. 1993) (visitor for pleasure); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile). Like the individuals involved in those cases, petitioner's lawful status depended on his "having a residence in a foreign country which he has no intention of abandoning," 8 U.S.C. 1101(a)(15)(F)(i). Hence, he could not acquire a domicile in the United States without violating his immigration status. See *Elkins* v. *Moreno*, 435 U.S. 647, 665 (1978) (explaining that provisions of Section 1101(a)(15) that condition admission "on an intent not to abandon a foreign residence * * * by implication [require] an intent not to seek domicile in the United States"). Accordingly, petitioner would not have prevailed even in the Second Circuit. Hence, this case presents no occasion for the Court to resolve the conflict on which the petition relies.[4]

---

[4] Two Terms ago the Court denied another petition seeking resolution of the same conflict. *McBride* v. *INS*, 112 S. Ct. 1558 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK C. WALTERS
NORAH ASCOLI SCHWARZ
Attorneys

FEBRUARY 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86108